Supreme Court No. 99272-0
Court of Appeals No. 80107-4-I

Supreme Court
of the State of Washington

Gregory Grahn and **Susan Grahn**,

Petitioners,

v.

The Bank of New York Mellon, as Trustee for the Certificate holders of CWALT, Inc., Alternative Loan Trust 2007-9T1 Mortgage Pass-through Certificates, Series 2007-9T1
and
Nisqually Bluff Homeowners Association,

Respondents.

Petition for Review

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1. Identity of Petitioner

Gregory and Susan Grahn, Appellants, ask this Court to accept review of the Court of Appeals decision terminating review, specified below.

2. Court of Appeals Decision

Grahn v. Bank of New York Mellon Corp., No. 80107-4-I (Oct. 5, 2020). A copy of the decision is included in the Appendix at pages 1-14. Grahns' Motion for reconsideration was denied by order filed November 2, 2020.

3. Issues Presented for Review

1. Under ***Edmundson v. Bank of of Am., N.A.***, 194 Wn. App. 920, 930-31, 378 P.3d 272 (2016), a bankruptcy discharge triggers the six-year statute of limitations to enforce a deed of trust. Here the note was discharged in bankruptcy on January 27, 2010, more than six years before the summary judgment order in this case. **Did the trial court err in holding the statute of limitations had not expired?**
2. In ***Bain v. Metro. Mort. Grp. Inc.***, 175 Wn.2d 83, 285 P.3d 34 (2012), this Court indicated that a note can be split from its deed of trust under certain facts. Here, the note was transferred separately from the deed, to different parties, then discharged in bankruptcy before BNY acquired any interest in the deed. **Did the trial court err in finding that BNY could be a valid beneficiary entitled to enforce the deed?**
3. Under ***Bavand v. OneWest Bank***, 196 Wn. App. 813, 826, 385 P.3d 233 (2016), a declaration satisfies the

requirements of the Business Records Act if the declarant identifies their role as custodian, has personal knowledge of the records of the business in general, and has personal knowledge of the specific records at issue through the declarant's own review of those records. Here, the declaration of Gerardo Trueba failed to meet that standard. **Did the trial court err in finding the Trueba declaration sufficient to establish BNY as holder of the note?**

4. Statement of the Case

4.1 Grahns purchased the real property in 2007 and the bank transferred the note and deed of trust separately to different parties.

Grahns purchased the real property in 2007 and executed two promissory notes to Kitsap Bank. CP 71-73. In addition to the two promissory notes, Grahns also executed two deeds of trust. CP 228. Kitsap Bank assigned "all beneficiary interests" in the deeds of trust to MERS.[1] CP 48-49. Kitsap Bank endorsed and transferred the note to Countrywide. CP 73. The note was eventually endorsed in blank, turning it into bearer paper. CP 73. In the current action, BNY claimed that both the deed of trust and the note were assigned by Kitsap Bank to MERS and then assigned by MERS to BNY in 2010. CP 338. However, in

[1] Only the first lien note and deed of trust have been argued in this matter. BNY has never claimed to have received the second lien note. Thus for the remainder of this petition Grahns will refer to the note and deed of trust in the singular.

2014, BNY was not claiming to be "the beneficiary, in possession of the note, or entitled to enforce the note." *See* CP 21:18-22. BNY also confirmed that MERS (not BNY) was the beneficiary at that time. CP 62.

4.2 Grahns defaulted on the note and obtained bankruptcy relief, after which BNY foreclosed on the property.

In February 2009, Grahns defaulted on the note. CP 27. In April 2009, BNY sent Grahns a Notice of Acceleration. CP 27, 84-85. In September 2009, Grahns filed for bankruptcy protection. CP 349. The bankruptcy court discharged the promissory notes in full on January 27, 2010. CP 414-15. In May 2010, MERS attempted to assign its beneficiary interests to BNY. CP 48. At that time (pre-*Bain*), Grahns assumed it was a valid assignment. In October 2010, BNY foreclosed on the deed of trust. Grahns later discovered that the foreclosure and the deed of trust were not in the correct name of BNY's REMIC trust. BNY ultimately agreed.

4.3 Recognizing its error, BNY filed a Declaratory Judgment action to void the foreclosure and trustee's sale but dismissed it without a final decision on all issues.

In September 2013, BNY filed a Declaratory Judgment action in which it admitted that the 2010 assignment from MERS to BNY was erroneous and asked the court to declare the

foreclosure to be void. CP 68-69. As part of that action, BNY asserted that MERS (not itself) was the actual beneficiary of the deed at that time. CP 62. At summary judgment, the trial court declared the foreclosure and trustee's sale void but denied summary judgment on reinstatement of the deed of trust. CP 15-16. BNY dismissed its action without going to trial.

4.4 Grahns filed the present Declaratory Judgment action, seeking a declaration that the deed of trust had become unenforceable.

In 2017 Grahns brought the current Declaratory Judgment action to determine whether the deed of trust should be declared unenforceable due to being split from the debt, and/or violating the statute of limitations. BNY admitted in discovery that its factual statements from its 2013 complaint were true and correct. CP 36. BNY refused to answer Grahns' interrogatories asking when BNY first acquired any interest in the note or deed of trust. CP 246, 311, 313. BNY stated that it "believed" the chain of title went from Kitsap Bank to MERS, and then to BNY. CP 312.

On cross-motions for summary judgment, the trial court ruled in favor of BNY and dismissed Grahns' complaint. Grahns appealed.

4.5 The Court of Appeals affirmed the trial court's dismissal of Grahns' claims.

The Court of Appeals affirmed the trial court's order. The court held that the Declaration of Gerardo Trueba established that BNY was the beneficiary of the deed and holder of the note. Opinion at 6. The court held that the deed and the note could not be split "as a matter of law". Opinion at 9. Thus, despite being discharged in bankruptcy, the note "survived bankruptcy." Opinion at 9. Lastly, the court also held that the current monthly obligations of the note also remained due and owing thus the statute of limitations had not run. Opinion at 10. Grahns' motion for reconsideration was denied Nov. 2, 2020. Grahns now petition this court for review.

5. Argument

A petition for review should be accepted when the decision of the Court of Appeals is in conflict with a decision of the Supreme Court or with a published decision of the Court of Appeals or presents an issue of substantial public interest. RAP 13.4(b)(1), (2), (4).

The decision of the court of appeals conflicts with ***Edmundson v. Bank of of Am., N.A.***, 194 Wn. App. 920, 930-31, 378 P.3d 272 (2016). *Edmundson* holds that a bankruptcy discharge cancels all monthly obligations and starts the running

of the limitations period over the entire lien of the deed of trust. Here, the Court of Appeals refused to consider the effect of the bankruptcy discharge in its limitations ruling. Instead the court held that monthly obligations were still due and owing, in conflict with *Edmundson*.

The decision of the Court of Appeals conflicts with this Court's decision in ***Bain v. Metro. Mort. Grp. Inc.***, 175 Wn.2d 83, 285 P.3d 34 (2012). In *Bain*, this Court observed that a deed of trust "could" be rendered unenforceable by being split from its note, depending on the facts of the case. ***Bain***, 175 Wn.2d at 112-13. Here, the Court of Appeals did not consider the specific facts of the case and instead held that splitting of the deed and note cannot occur as a matter of law, in conflict with *Bain*.

The decision of the Court of Appeals conflicts with ***Bavand v. OneWest Bank***, 196 Wn. App. 813, 826, 385 P.3d 233 (2016). Under *Bavand*, a declaration satisfies the requirements of the Business Records Act if the declarant identifies their role as custodian, has personal knowledge of the records of the business in general, and has personal knowledge of the specific records at issue through the declarant's own review of those records. Here, the declaration of Gerardo Trueba failed to meet that standard. Yet the Court of Appeals held the declaration was sufficient, in conflict with *Bavand*.

5.1 The decision of the Court of Appeals conflicts with *Edmundson*.

When the statute of limitations bars enforcement of a deed of trust, the record owner of the property may bring an action to quiet title. **RCW 7.28.300**. That is what Grahns did here. Grahns were entitled to judgment in their favor if the statute of limitations to enforce the deed of trust had expired.

Under *Edmundson*, the six-year statute ran from Grahns' 2010 bankruptcy discharge and expired prior to the filing of this action. In *Edmundson*, the Edmundsons executed a promissory note and deed of trust to purchase real property. ***Edmundson***, 194 Wn. App. at 923. Payments were due every month from September 2007 through August 2037. ***Id.*** The Edmundsons failed to make the November 2008 payment or any payment thereafter. ***Id.*** Edmundsons petitioned for bankruptcy and obtained a discharge in December 2013. ***Id.*** Relying on the U.S. Supreme Court opinion in ***Johnson v. Home State Bank***, 501 U.S. 78, 82–83, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991), the *Edmundson* court held that the bankruptcy discharge relieved Edmundsons of their personal liability on the note but did not avoid or eliminate the lien of the deed of trust. ***Edmundson***, 194 Wn. App. at 925-26. The beneficiary of the deed of trust could still enforce the deed, so long as that remedy was sought before the statute of limitations expired. ***Id.***

On the statute of limitations issue, the *Edmundson* court held that the six-year statute of limitations for an installment note runs on each installment from the time it comes due. ***Edmundson***, 194 Wn. App. at 930-31. After personal liability on the note is discharged in bankruptcy, no more installment payments come due, and the statute of limitations will run from the date the last payment before discharge came due:

> Correspondingly, the statute of limitations for each subsequent monthly payment accrued on the first day of each month after November 1, 2008 until the Edmundsons no longer had personal liability under the note. They no longer had such liability as of the date of their bankruptcy discharge, December 31, 2013. Thus, from December 1, 2008 through December 1, 2013, the statute of limitations accrued for each monthly payment under the terms of the note as each payment became due.

Edmundson, 194 Wn. App. at 931. Although the statute had not expired in *Edmundson*, the rule set forth in that case requires the opposite result here: Grahns are entitled to judgment in their favor.

Grahns defaulted on the debt in March 2009, CP 38, and the debt was discharged in bankruptcy in January 2010, CP 27, 414. The language of Grahns' discharge mirrored that in *Edmundson*: "a creditor may have the right to enforce a valid lien, such as a mortgage or security interest, against the debtor's property after the bankruptcy, if that lien was not avoided or

eliminated in the bankruptcy case." CP 415; *compare* ***Edmundson***, 194 Wn. App. at 925. Thus, under *Edmundson*, the Grahns' last installment came due in January 2010 and started the running of the six-year statute of limitations, which thereby expired in January 2016, before Grahns filed their complaint in 2017 and before the trial court's summary judgment decision in 2018. Because the six-year statute of limitations had expired, Grahns were entitled to judgment in their favor.

The Court of Appeals decision conflicts with *Edmundson*. The Court of Appeals reasoned, "The note was not listed by Grahn as an unsecured debt on the petition for bankruptcy or bankruptcy schedules, and the order of discharge did not extend to any deed of trust. Because the note was secured by the deed of trust it survived bankruptcy, Grahn's argument fails." Opinion at 9. This is in direct conflict with *Edumndson*. In *Edmundson*, the note did not "survive bankruptcy." The note was discharged. Only the deed of trust survived.

The Court of Appeals decision uses this erroneous reasoning to hold that the six-year limitations period had not expired on the theory that installment payments continue to come due up to the maturity date of March 1, 2037. This conclusion conflicts with *Edmundson*. Under *Edmundson*, Grahns' last installment came due in January 2010 just before the bankruptcy discharge. There were no more installments due

after that. The six-year statute started to run in January 2010 and expired in January 2016. The Court of Appeals decision conflicts with *Edmundson* and is in error. This Court should accept review, correct the error, and grant summary judgment in favor of Grahns.[2]

5.2 The decision of the Court of Appeals conflicts with *Bain*.

The Court of Appeals held that the deed could not be split, reasoning that the deed of trust follows the note "as a matter of law." Opinion at 9. This reasoning conflicts with this Court's decision in ***Bain v. Metro. Mort. Grp. Inc.***, 175 Wn.2d 83, 285 P.3d 34 (2012). In *Bain*, this Court observed that a deed of trust **could** be rendered unenforceable by being split from its note, depending on the facts of the case. ***Bain***, 175 Wn.2d at 112-13.

The *Bain* court made it clear that the use of MERS turns a three-party deed of trust into a four-party deed of trust. ***Bain***, 175 Wn.2d at 96. Therefore it "challenges the general axiom" that the deed follows the debt. ***Id.*** at 97. Consequently, the *Bain* court concluded that under certain scenarios, a deed **could** be split from the debt:

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[2] The Court of Appeals found it unnecessary to address the tolling arguments suggested by BNY. Opinion at 12 n.37. To the extent this Court may need to address those arguments, Grahns rely on their arguments set forth in the Court of Appeals briefs and Motion for Reconsideration.

> Selkowitz argues that MERS and its allied companies have split the deed of trust from the obligation, making the deed of trust unenforceable. While that certainly *could* happen, given the record before us, we have no evidence that it did.

Id. at 112 (emphasis in original).

The Court of Appeals holding in this case, that a splitting cannot occur as a matter of law, directly conflicts with *Bain*. According to *Bain*, resolution of that question "depends on what actually occurred with the loans in front of us." ***Bain***, 175 Wn.2d at 114. Thus, *Bain* requires courts to fully review the facts in each individual case to determine whether a split occurred, and to then determine the effect, if any, of such occurrence.

This Court has yet to address what specific facts could constitute a split or what the effect would be. This open question remains a matter of public interest that should be addressed by this Court. *See* **RAP 13.4(b)(4)**.

Here, Kitsap Bank assigned "all beneficial interest" in the *deed of trust* to MERS in February 2007. CP 48. But Kitsap did not endorse the *note* to MERS; Kitsap endorsed the note to Countrywide N.A. CP 73. It is beyond question that the deed of trust was intentionally transferred to one entity (MERS) and the note was transferred to a different entity (Countrywide N.A.). Even if the Deed of Trust Act is based on a presumption that the deed will follow the note, that is not what happened here. Here,

the deed was intentionally split from the note. The Court of Appeals' conclusion to the contrary, "as a matter of law," rewrites the facts.

Bain made it clear MERS is an ineligible "beneficiary" within the terms of the Deed of Trust Act if it never held the promissory note or other debt instrument secured by the deed of trust. ***Bain***, 175 Wn.2d at 110. MERS was also not acting as an agent for BNY.[3] Since MERS never held the debt and was never an agent of a debt-holder, MERS could not be a lawful beneficiary under the deed of trust act. As such, MERS could never assign lawful beneficiary interests to BNY, because a party cannot assign interests greater than it possesses.

Bain defines a "beneficiary" as "the holder of the instrument or document evidencing the obligations secured by the deed of trust." ***Bain***, 175 Wn.2d at 98. According to *Bain*, "holder" with respect to a negotiable instrument, means "the person in possession of the instrument that is **payable** to bearer." ***Id.*** at 104 (emphasis added). The Washington UCC, **RCW 62A.3-104**, defines a negotiable instrument as:

> (a) Except as provided in subsections (c) and (d), "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money,

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[3] BNY refused to answer discovery on this question. CP 321-22. Grahns asserted in the summary judgment papers that MERS was not an agent of BNY, CP 32, and BNY never refuted that assertion.

> with or without interest or other charges described in the promise or order, if it:
>
> (1) Is payable to bearer or to order at the time it is issued or first comes into possession of a holder…

The underlying connection in all of these statutory definitions is that Washington law requires a note to be "payable" or "enforceable" in order to be a negotiable instrument, and thus by extension, to be "held" as a negotiable instrument.

A note that is first discharged in bankruptcy and then subsequently transferred to a third party does not meet these definitions. The discharged note cannot be resurrected to give a subsequent recipient the right to claim that the note "survived bankruptcy," that the recipient now "holds the note," or that the recipient could sue Grahns for personal liability thereunder. Any party that received the note after discharge did not receive a payable instrument when it first came into their possession. To the contrary, the discharged note follows **RCW 62A.3-601** (Discharge and effect of discharge), where the effect of the discharge is applied against a future entity that obtains the note. Simply put, one who obtains the note after the bankruptcy discharge is not a "holder" of the note and cannot be a beneficiary under the Deed of Trust Act.[4]

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[4] In contrast, a "lawful beneficiary" who held both the note and the deed of trust at time of a discharge would still remain a lawful

BNY was not a "holder" of the note because the note had already been discharged before BNY obtained it. BNY itself only claims to have acquired the note through assignment from MERS in May 2010, three months **after** the bankruptcy discharge. CP 338:17-21.[5] Based on BNY's own pleadings, BNY never held the note while it was an enforceable negotiable instrument.

Because MERS was an unlawful beneficiary, MERS could not take actions to engage the power of sale provisions in the deed of trust. ***Bain***, 175 Wn.2d at 89, 111. Likewise, MERS could not assign such authority to a subsequent entity. BNY cannot claim to hold this greater authority because BNY also never held enforceable interests in the note. (BNY is no different than MERS in this regard.) Accordingly, Grahns correctly stated "In this action, because the loans are discharged, no entity can subsequently claim that it holds the deed of trust while also

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beneficiary entitled to enforce the deed of trust. This is because that entity held a note that was "enforceable" at "the time it took possession." **RCW 62A.3-104(a)(1)**.

[5] Strangely enough, as late as 2014, BNY was not claiming to be "the beneficiary, in possession of the note, or entitled to enforce the note." *See* CP 21:18-22. This prior, inconsistent position calls into question the veracity of BNY's current claim to have received the note in May 2010. But for purposes of this argument, the point is that even the **earliest** date proposed by BNY for its acquisition of the note was still **after** the note had already been discharged in bankruptcy.

having an interest in the underlying debt. Therefore, no entity can ever satisfy the deed of trust act." Br. of App. 17-18.

The ultimate question is very simple: if an entity is not a lawful "holder" of an enforceable note, and that entity only receives security interests from an unlawful beneficiary, can that entity then claim itself to have become a lawful beneficiary? The answer is no. This position holds true regardless of whether Grahns listed the debt as being "secured" or "unsecured" in their bankruptcy schedules. Lawful beneficiary interests cannot be created from parties who themselves had no lawful beneficiary interests.

The Court of Appeals decision conflicts with *Bain*. This Court should accept review. This Court should reverse the decisions of the prior courts and make the following specific findings: (1) that the deed and the debt were initially split, (2) that pursuant to the bankruptcy discharge BNY could not become an after-the-fact valid "holder" of an unenforceable note, (3) that MERS was not a lawful beneficiary under the deed of trust act, and (4) that BNY could not receive lawful beneficiary interests through an assignment from MERS. Based on these findings, the court should then order the deed of trust as now being unenforceable.

5.3 The decision of the Court of Appeals conflicts with *Bavand*.

The only sworn declaration provided by BNY was the declaration of Gerardo Trueba. This declaration failed to meet the requirements of CR 56 and the rules of evidence. Grahns properly objected to the declaration. CP 243-48. Grahns argued that the declaration was conclusory and not based on personal knowledge.[6] CP 244, 248. The Court of Appeals held that the declaration satisfied CR 56, based on its reading of ***Bavand v. OneWest Bank***, 196 Wn. App. 813, 826, 385 P.3d 233 (2016). Opinion at 6. But the Court of Appeals decision is in conflict with a correct understanding of *Bavand*.

The *Bavand* court held, "Statements made by a 'custodian or other qualified witness' in a declaration based on the declarant's review of business records satisfy CR 56(e) if the declaration satisfies the business records act—RCW 5.45.020." The business records act requires detailed testimony about the records to demonstrate that the records—or the declarant's statements about them—are sufficiently reliable to be admitted into evidence:

> A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian

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[6] The Court of Appeals was mistaken in finding Grahns' objections were "raised for the first time on appeal." Opinion at 7 n.21. The objections were properly made in the trial court, CP 243-48, and in Grahns' opening brief, Br. of App. 28 n.19.

> or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

RCW 5.45.020.

The *Bavand* court explained, through examples, that a declaration would satisfy the act if the declarant (1) identified their role as a "custodian or other qualified witness," (2) had personal knowledge of the records of the business in general, and (3) had personal knowledge of the specific records through the declarant's own review of the business records. ***Bavand***, 196 Wn. App. at 828-29. Each of the *Bavand* court's examples specifically noted that the declarant had personal knowledge from reviewing the records concerning Bavand.

Close scrutiny of the Trueba declaration demonstrates that, contrary to the decision of the Court of Appeals, the declaration fails to meet this legal standard. Trueba did not testify that he had reviewed the records relating to Grahns. CP 88. Trueba testified only that he was familiar with "record keeping procedures," and "how Bayview keeps its business records." CP 88. He did not testify that he had any familiarity with BNY's records. CP 88. He did not testify that he ever reviewed the notes, deeds of trust, or any other records relating

to Grahns. CP 88. Instead, he carefully testified that he was familiar with "procedures" and with "underlying loan documents **like** the one at issue." CP 88 (emphasis added). By his own careful language, Treuba was **not** familiar with records pertaining to the Grahns; he was only familiar with records **like** notes and deeds of trust. This falls short of the requirements of the business records act as explained in *Bavand*. The Trueba declaration was inadmissible as hearsay and not based on personal knowledge.

The Court of Appeals also erred in concluding the copy of the note attached as Exhibit 2 to the Trueba declaration proved that BNY possessed the note. Opinion at 6. "If there is any indication that the beneficiary declaration might be ineffective," then a greater investigation of the facts is necessary. ***Lyons v. U.S. Bank Nat. Ass'n.***, 181 Wn.2d 775, 790, 336 P.3d 1142 (2014). Where it is ambiguous whether the declaration proves the bank is the holder of the note, there is a genuine issue of material fact that precludes summary judgment. ***Id.*** at 791.

Treuba did not testify where the photocopy came from. CP 89. He did not write that it was part of the business records of Bayview or BNY. CP 89. Various copies of the note had been passed between the parties during prior litigation. This copy was first introduced during the 2013 litigation, *see* CP 71-73, during which BNY claimed that MERS was the beneficiary (and

therefore the holder of the note), *see* CP 62. At that time, BNY was not claiming to be "the beneficiary, in possession of the note, or entitled to enforce the note." *See* CP 21:18-22. Possession of the photocopy cannot prove ownership of the original note, especially when BNY itself formerly declared the opposite to be true. BNY presented no testimony establishing the source of the photocopy or the location of the original.

BNY refused to answer discovery as to how and when it allegedly acquired possession of the note. CP 311-13; *see also* CP 330 (Trueba verified the discovery responses under oath). BNY's repeated assertion that the note was transferred from Kitsap Bank directly to MERS was contradicted by the endorsements on the note itself. With BNY playing so coy about whether it actually possessed the note and also being unable to trace the accurate chain of transactions, this Court should closely scrutinize what BNY and Trueba actually said and what they took care not to say. Neither Trueba's declaration nor the color photocopy provide the indicia of reliability that the Court must find before applying the business records act. The Court of Appeals decision conflicts with *Bavand*.

This Court should accept review and hold that Trueba's statement—that BNY is the "current noteholder and beneficiary of the note"—was inadmissible hearsay unsupported by personal knowledge from review of the business records or by any other

indicia of reliability as to the source, method, or time of preparation or production of the records. *See* RCW 5.45.020. BNY failed to prove it was a legal beneficiary.

6. Conclusion

The decision of the Court of Appeals conflicts with *Edmundson*, *Bain*, and *Bavand*. Contrary to the decision of the Court of Appeals, the six-year statute of limitations ran from the 2010 bankruptcy discharge and expired prior to this action; the deed of trust was rendered unenforceable where BNY did not hold the note before discharge and could not obtain beneficiary status through a later assignment from MERS; and the Trueba declaration was inadmissible and failed to prove BNY held the note. This Court should accept review and reverse the decisions of the trial court and the Court of Appeals. This Court should grant summary judgment in Grahns' favor or remand to the trial court for further proceedings on any material questions of fact.

Respectfully submitted this 1st day of December, 2020.

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7. Appendix

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

GREGORY E. GRAHN and SUSAN M. GRAHN, husband and wife, Appellants, v. THE BANK OF NEW YORK MELLON CORPORATION, as Trustee for the Certificate Holders of CWALT, INC., Alternative Loan Trust 2007-9T1 Mortgage Pass-Through Certificates Series 2007-9T1, Respondent. MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; NISQUALLY BLUFF HOMEOWNERS' ASSOCIATION, Defendants.	)	No. 80107-4-I UNPUBLISHED OPINION

VERELLEN, J. — In this declaratory judgment action to quiet title, Gregory and Susan Grahn contend that Bank of New York Mellon Trust (BNY) is an ineligible beneficiary of a deed of trust for lack of any interest in the underlying note. Because a declaration from the loan service provider adequately establishes that BNY is the holder of the note, it is a lawful beneficiary.

Grahn also contends that after the note and deed of trust were "split," the debt was subject to the bankruptcy order discharging unsecured debts, but he fails to provide persuasive authority that the split-the-note theory has any application here.

Grahn contends the six-year statute of limitations has expired because the installment note was accelerated in 2009. But the mere notice of intent to accelerate did not accomplish an acceleration triggering the statute of limitations.

Finally, Grahn contends BNY is judicially estopped to deny it lacks any interest in the underlying deed of trust, but he fails to satisfy the requirements of judicial estoppel including clearly inconsistent positions and that the trial court accepted the allegedly initial inconsistent position.

Because Grahn fails to establish any basis for relief on appeal, we affirm the trial court decision that BNY has a valid interest in the deed of trust and the dismissal of Grahn's request to quiet title.

FACTS

In February 2007, Grahn signed an installment promissory note for $512,000, payable to Kitsap Bank. The note was secured by a deed of trust on a residence. Kitsap Bank assigned "all beneficiary interests" under the deed of trust to Mortgage Electronic Registration Services (MERS).[1] Kitsap Bank endorsed the note over to Countrywide N.A., which endorsed it to Countrywide Home Loans Inc., which converted it into bearer paper. The note was ultimately held by BNY.

[1] Clerk's Papers (CP) at 48-49.

Bayview Loan Servicing LLC was the loan servicer for BNY and maintained the loan documents.

In February of 2009, Grahn defaulted on the installment note and has made no subsequent payments. That March, Grahn received a notice of intent to accelerate.

In January 2010, Grahn filed for chapter 7 bankruptcy, culminating in an order discharging his unsecured debts. That May, MERS assigned "all beneficiary interests" under the deed of trust to BNY but omitted a portion of its formal name, "CWALT INC." In October 2010, a nonjudicial trustee's sale occurred. A trustee's deed conveyed the property to BNY. BNY recorded and then in April 2011, re-recorded the trustee's deed.

In 2013, BNY filed an unlawful detainer action to obtain possession of the property. BNY took a voluntary dismissal of the unlawful detainer action and later commenced a quiet title action. Because MERS omitted a portion of BNY's formal name on the May 2010 assignment of the deed of trust , BNY requested that the court unwind the 2010 trustee's sale. In 2014, the court issued an order "per the agreement of the parties" that the 2010 trustee's sale and resulting trustee's deeds were void.[2]

In 2017, Grahn filed this declaratory judgment action to quiet title and declare the deed of trust "void and [expunge it] from the auditor's records."[3] He

[2] CP at 16.

[3] CP at 26.

filed a motion for summary judgment, and BNY filed a cross motion for summary judgment to dismiss the quiet title action and to declare the deed of trust valid.

On March 1, 2018, MERS issued a "Second Corrective Corporate Assign Deed of Trust" to include the formal name of BNY and correct the May 2010 assignment of the deed of trust.[4]

On April 13, 2018, the trial court granted summary judgment in favor of BNY and dismissed Grahn's quiet title action.

Grahn appeals.

ANALYSIS

I. Lawful Beneficiary

Grahn argues that BNY was not a lawful beneficiary because BNY "never held any [interest] in the underlying debt."[5] He also contends that the evidence BNY presented at summary judgment violated CR 56(e) and was improperly considered.

We review an order granting summary judgment de novo.[6] Summary judgment is appropriate "'only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.'"[7] We view

[4] CP at 92.

[5] Appellant's Br. at 13.

[6] Loeffelholz v. Univ. of Wash., 175 Wn.2d 264, 271, 285 P.3d 854 (2012).

[7] Bavand v. OneWest Bank, 196 Wn. App. 813, 824-25, 385 P.3d 233 (2016) (quoting Scrivener v. Clark Coll., 181 Wn.2d 439, 444, 334 P.3d 541 (2014)) (citing CR 56(c)).

the evidence in the "light most favorable to the nonmoving party."[8] We review an objection raised at summary judgment de novo based only on a party's argument below.[9]

The person entitled to enforce an instrument or note is the holder of the note.[10] The "holder" of a note is "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession."[11] A note endorsed in blank is payable to the bearer and "may be negotiated by transfer of possession alone."[12] The holder of the note, which is the evidence of the debt, has the power to enforce the deed of trust securing the note because the deed of trust follows the note by operation of law.[13]

And "a holder of a promissory note need not produce the original note to prove the right to enforce a deed of trust."[14] "A declaration . . . stating that the beneficiary is the actual holder of the promissory note . . . shall be sufficient proof [of the status to enforce the note]."[15] "Statements made by a 'custodian or other

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[8] Loeffelholz, 175 Wn.2d at 271 (citing CR 56(c)).

[9] Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.3d 301 (1998).

[10] RCW 62A.3-301; see also Brown v. Dep't of Commerce, 184 Wn.2d 509, 524-25, 359 P.3d 771 (2015); Bain v. Metro. Mortg. Grp., Inc., 175 Wn.2d 83, 88-89, 104, 285 P.3d 34 (2012).

[11] RCW 62A.1-201(b)(21)(A).

[12] RCW 62A.3-205(b).

[13] Bain, 175 Wn.2d at 104 (the deeds of trust act "[c]ontemplates that the security instrument will follow the note, not the other way around").

[14] RCW 61.24.030(7)(a).

[15] Bavand, 196 Wn. App. at 824 (emphasis omitted) (alteration in original) (quoting RCW 61.24.030(7)(a)).

qualified witness' in a declaration based on the declarant's review of business records satisf[ies] CR 56(e)."[16]

Here, the materials submitted on summary judgment establish that BNY is the holder of the note. BNY provided a copy of the promissory note with Grahn's initials on each page in blue ink. Thus, BNY possessed and was the holder of the note.[17] BNY also submitted a declaration from Bayview's litigation manager, Gerardo Trueba, which establishes that Bayview is the "agent/servicer and [attorney-in-fact]" of BNY, that BNY is "the beneficiary of the note and accompanying deed of trust," and that BNY is the "current noteholder and beneficiary of the note and accompanying deed of trust."[18] BNY's copy of the promissory note and Trueba's declaration satisfy CR 56(e) and establish BNY is the holder of the note.

In his opening brief, Grahn makes general arguments about the requirements of CR 56(e), stating in part that BNY's evidence "was built on . . . unsworn, uncorroborated, and improper foundation solely created and presented by the attorneys."[19]

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[16] Id. at 826.

[17] We also note that Grahn's second request for judicial notice refers to a copy of the promissory note identical to the note described above as "Copy received by BNY-Trust from prior court action." CP at 42. Grahn also contends the note was "bearer paper" so whoever has physical possession is the holder of the note. CP at 247. To the extent this was an acknowledgment that BNY had received the note, it is consistent with other evidence that BNY is the holder of the note.

[18] CP at 88-89.

[19] Appellant's Br. at 28.

But Grahn did not raise these specific objections to Trueba's declaration in the trial court. In his objection to the trial court, Grahn challenged Trueba's personal knowledge as a loan servicer, asserting that BNY "is the only entity that has direct knowledge of [BNY's] rights, entitlements, and asset ownership."[20] But Trueba's declaration establishes he is a litigation manager at Bayview, he has personal knowledge of the policies, practices, and procedures of Bayview in servicing mortgage loans, and he is familiar with Bayview's record keeping of the underlying loan documents. As the agent and the attorney-in-fact for BNY, Bayview has the authority to file declarations authenticating loan documents.[21]

Next, Grahn contends that when Kitsap Bank assigned "all beneficiary interests" in the deed of trust to MERS and subsequently transferred all interests in the promissory note to Countrywide, the deed of trust and the note split.[22] Thus,

[20] CP at 244. The objection filed in the trial court included that Trueba's "conclusory comments . . . derived from hearsay-based information and belief" which is a violation of CR 56(e). CP at 248. But Grahn did not point to anything specific in Trueba's declaration. The only portion of Trueba's declaration that is made on information and belief is the portion of the declaration that states Grahn's principal balance.

[21] See Winters v. Quality Loan Serv. Corp. of Wash., 11 Wn. App. 2d 628, 646, 454 P.3d 896 (2019) (an unrebutted declaration by servicer and attorney-in-fact that a bank is the holder of the note satisfies the statutory requirement for proof of a beneficiary). For the first time in his reply brief, Grahn made specific objections to Trueba's declaration. But we will not consider a claim raised for the first time on appeal that "there is no evidence that the [servicer's] employee had personal knowledge about the location of the note." Id. Further, we do not consider arguments raised for the first time in a reply brief. Bergerson v. Zurbano, 6 Wn. App. 2d 912, 926, 432 P.3d 850 (2018) (citing RAP 10.3(c)). Therefore, Grahn's general challenge to lack of personal knowledge of anyone other than BNY fails in the face of Trueba's unrebutted declaration.

[22] Appellant's Br. at 15-17.

he argues, any subsequent owner of the deed of trust held no security interest in the debt.

Grahn relies on Bain v. Metropolitan Mortgage Group, Inc. for the above proposition.[23] Our Supreme Court in Bain held that "MERS is an ineligible 'beneficiary'. . . if it never held the promissory note or other debt instrument secured by the deed of trust.[24] But the court in Bain cast doubt upon a theory that involvement of MERS would automatically constitute a "split" rendering a deed of trust unenforceable: "If, for example, MERS is in fact an agent for the holder of the note, likely no split would have happened."[25] Further, the Ninth Circuit has held that the split-the-note theory "has no sound basis in law or logic," while other courts applying Washington law have routinely rejected the premise of Grahn's "split-the-note" theory.[26]

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[23] 175 Wn.2d 83, 285 P.3d 34 (2012).

[24] Id. at 110.

[25] Id. at 112.

[26] In Cervantes v. Countrywide Home Loans, Inc., 656 F.3d 1034 (2011), the Ninth Circuit explained that the split-the-note theory has no sound basis in law or logic and should be rejected. The court recognized that splitting a note from a deed of trust is not problematic as long as, at the time of foreclosure, the party attempting to foreclose holds the note or is acting on behalf of the noteholder. In other words, a split does not render the note and/or the deed permanently unenforceable. See, e.g., Rahman v. Greenpoint Mortg. Funding, No. 2:19-cv-530, 2019 WL 3550314, at *4 (U.S. Dist. Ct. W.D. Seattle) ("This unsupported legal theory has . . . been roundly and uniformly rejected."); Bavand v. OneWest Bank FSB, No. C12-0254JLR, 2013 WL 1208997, at *2 (W.D. Wash. Mar. 25, 2013) (citing Cervantes, 656 F.3d at 1044-45 ("[T]he 'split the note' theory–the argument that if ownership of a deed of trust is split from ownership of the underlying promissory note, one or both of those documents becomes unenforceable" has been rejected.)); Canzoni v. Countrywide Bank, No. C16-5239-RBL, 2016 WL 3251403, at *3 (W.D. Wash. June 13, 2016) (Some courts

In a related argument, Grahn contends that because only MERS had been assigned "all beneficiary interest" in the deed of trust at the time Grahn filed for bankruptcy, there was no security for the note.[27] Grahn argues that because the debt was "unsecured" the discharge in bankruptcy must have discharged the note, an "unsecured" debt.[28]

But, as discussed, the deed of trust followed the note as a matter of law, so there is no support for Grahn's split-the-note theory. The note was not listed by Grahn as an unsecured debt on the petition for bankruptcy or bankruptcy schedules, and the order of discharge did not extend to any deed of trust. Because the note was secured by the deed of trust it survived bankruptcy, Grahn's argument fails.

II. Statute of Limitations

Grahn contends that the six-year limitations period to enforce the note started once the note was fully accelerated in 2009. Grahn argues that BNY's efforts to quiet title in its favor filed in 2018 are barred by the statute of limitations.

The statute of limitations for "[a]n action upon a contract in writing, or liability express or implied arising out of a written agreement" is six years.[29] "'[W]hen recovery is sought on an obligation payable by installments, the statute of

describe and reject the "split-the-note" theory as an incorrect notion that "the Deed 'follows the Note' into the abyss.").

[27] Appellant's Br. at 17-18.

[28] Id.

[29] RCW 4.16.040(1).

limitations runs against each installment from the time it becomes due; that is, from the time when an action might be brought to recover it.'"[30] After a proceeding is declared void, it never happened for legal purposes.[31]

As this court held in Merceri v. Bank of New York Mellon, a notice of intent to accelerate containing substantially the same language used in the March 19, 2009, notice here, is a statement of intent to accelerate in the future and "the final six-year period to take an action related to the debt does not begin to run until it fully matures [on the maturity date.]"[32] And mere default alone will not accelerate the payments due on an installment note, some affirmative action is required.[33]

Here, the language of the installment note provided that the principal amount was $512,000, that the Grahns were to pay every month on the first day of each month beginning in April of 2007, and that the maturity date was March 1, 2037. Because the Grahns defaulted but only received a notice of intent to accelerate and no other action was taken, the six-year limitations period has not run.

Grahn attempts to distinguish Merceri on various grounds. First, Grahn argues that Merceri is being improperly raised for the first time on appeal. But the

[30] Merceri v. Bank of N.Y. Mellon, 4 Wn. App. 2d 755, 759-60, 434 P.3d 84 (2018) (quoting Edmundson v. Bank of Am., 194 Wn. App. 920, 930, 378 P.3d 272 (2016)).

[31] Frias v. Asset Foreclosure Servs. Inc., 181 Wn.2d 412, 427 n.2, 334 P.3d 529 (2014).

[32] 4 Wn. App. 2d 755, 759, 434 P.3d 84 (2018).

[33] Id. at 760.

issue whether the debt had been accelerated or whether BNY was entitled to enforce the note for each ongoing unpaid installment was raised below. A party is not precluded from raising new authority for the first time on appeal of summary judgment if the issue in contention was raised below.[34] Thus, Grahn's argument fails because the acceleration issue was before the trial court.

Second, Grahn contends that Merceri should be distinguished because in Merceri, the debtor first initiated foreclosure six years after the notice of acceleration was given, but here, BNY immediately initiated foreclosure, which Grahn contends "confirm[ed] [BNY's] intent [to commence acceleration.]"[35] However, the trial court declared the nonjudicial trustee's sale that occurred on October 8, 2010 void. And after a proceeding is declared void, it never happened for legal purposes.[36] Therefore, Grahn's reliance on the trustee's sale to prove BNY's intent to commence acceleration is misguided.

Third, Grahn contends that unlike in Merceri, here, the notice of trustee's sale reflects the debt had been accelerated. But the notice of trustee's sale stated only that Grahn defaulted on $23,556.89. That specific default amount is not contradicted by the recitation that the principal balance owing was $501,216.54. A notice indicating the amount in default was $23,556.89 on the note, which had a principal balance of $501,216.54, does not reflect an acceleration in any sense.

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[34] Zonnebloem, LLC v. Blue Bay Holdings, LLC, 200 Wn. App. 178, 183 n.1, 401 P.3d 468 (2017) (citing RAP 2.5(a)).

[35] Appellant's Reply Br. at 12.

[36] Frias, 181 Wn.2d at 427 n.2.

Here, the notice of trustee's sale did not purport to demand or announce an acceleration of the note. And the statements issued through October 2017 had no reference to an accelerated amount. Because the installment loan was not accelerated until late 2017, at the earliest, the six-year limitation period has not run.[37]

III. Inconsistency and Judicial Estoppel

Finally, Grahn challenges the inconsistency of BNY's claim that it can enforce the deed of trust. Specifically, Grahn contends BNY's 2013 pleadings never mentioned that it received the deed of trust, but its 2017 pleadings argued that it received the deed of trust "as a matter of law."[38] He argues BNY is "violating judicial estoppel and not incorporating the prior asserted facts."[39] He also points to some 2014 trial court comments expressing uncertainty whether the deed of trust was automatically reinstated after the court voided the 2010 trustee's sale.

First, his arguments do not adequately account for the March 1, 2018 "Second Corrective Corporate Assign Deed of Trust." He cites no authority precluding the correction of an incomplete name in a prior assignment.

[37] We need not address the parties' alternative arguments regarding tolling.

[38] Appellant's Br. at 29.

[39] Id.

Second, judicial estoppel is an equitable doctrine that prevents a party from asserting one position in a court proceeding and later asserting "a clearly inconsistent position."[40]

> Three "core," nonexhaustive factors guide a trial court's determination of whether to apply judicial estoppel: (1) whether the party's later position is clearly inconsistent with its earlier position, (2) whether acceptance of the later inconsistent position would create the perception that either the first or the second court was misled, and (3) whether the assertion of the inconsistent position would create an unfair advantage for the asserting party or an unfair detriment to the opposing party.[41]

"Before the doctrine of judicial estoppel may be applied, a party's initial position—which is subsequently contradicted in a different proceeding—must be accepted by the court to which it is presented."[42] Grahn does not establish BNY has taken "clearly inconsistent" positions as required for judicial estoppel. The failure to mention receiving the deed of trust in 2013 is not "clearly inconsistent" with an allegation in 2017 that it received the deed of trust "as a matter of law."

And he provides no citations to the record to show that the trial court squarely accepted a proposition that BNY never possessed the deed of trust. At the hearing on the initial summary judgment motion in 2014, the court stated, "I don't believe [Grahn] has objected to the court voiding the [foreclosure] sale, that

[40] Taylor v. Bell, 185 Wn. App. 270, 281, 340 P.3d 951 (2014).

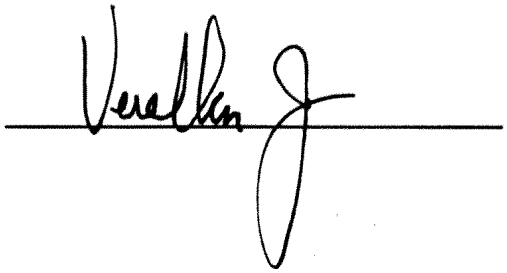
[41] Id. at 282 (footnote omitted).

[42] Id. at 273.

is the nonjudicial sale that took place before, and so that does put back in place the deed of trust [to BNY]."[43]

Finally, to the extent there may be exceptions to the doctrine that as a matter of law, the deed of trust follows the note, Grahn cites no authority supporting an exception in this setting.

Therefore, we affirm.



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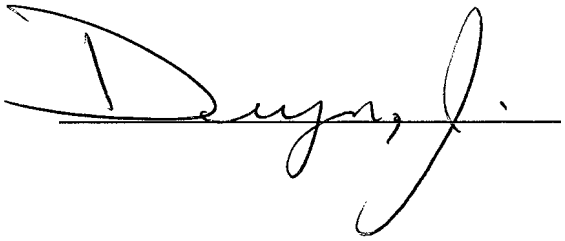
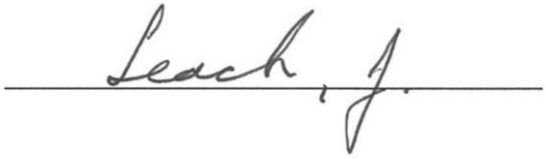




[43] Report of Proceedings (April 25, 2014) at 20; CP at 142.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

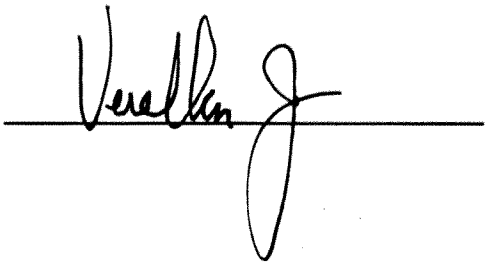
GREGORY E. GRAHN and SUSAN M. GRAHN, husband and wife, Appellants, v. THE BANK OF NEW YORK MELLON CORPORATION, as Trustee for the Certificate Holders of CWALT, INC., Alternative Loan Trust 2007-9T1 Mortgage Pass-Through Certificates Series 2007-9T1, Respondent.	)	No. 80107-4-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant filed a motion for reconsideration of the opinion filed October 5, 2020. The panel has considered the motion and determined it should be denied.

Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

FOR THE PANEL:



Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on December 1, 2020, I caused the foregoing document to be filed with the Court and served on Counsel listed below by way of the Washington State Appellate Courts' Portal.

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